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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RICHARD M. RIEHL

February 2, 1994

Our File No.
1162-101-71

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

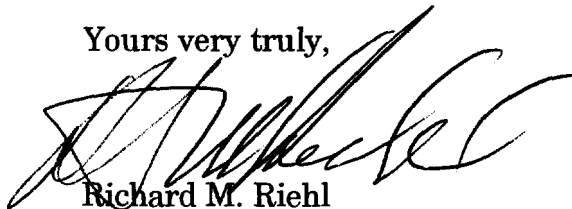
RE: MM Docket 93-158
FM Allocations Proceeding for Hazlehurst, Utica and Vicksburg,
Mississippi

Dear Mr. Caton:

On behalf of Donald B. Brady please find enclosed an original and four copies of his Reply to Opposition to Supplemental Comments of Donald B. Brady in the above-referenced proceeding.

Kindly communicate any questions directly to this office.

Yours very truly,



Richard M. Riehl

Enclosures (5)

RMR/das

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Before The

Federal Communications Commission

Washington, D.C. 20554

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments)

FM Broadcast Stations,)

Hazlehurst, Utica and)

Vicksburg, Mississippi)

MM Docket No. 93-158

RM No. 8239

RECEIVED**FEB - 2 1994**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: Chief, Mass Media Bureau

**REPLY TO OPPOSITION TO
SUPPLEMENTAL COMMENTS OF
DONALD B. BRADY**

Donald B. Brady ("Brady"), by his attorneys, hereby replies to the "Opposition to Supplemental Comments of Donald B. Brady" ("Opposition") filed by Willis Broadcasting Corporation ("Willis" or "Proponents") on January 21, 1994.¹ Willis argues: (1) that Brady's Supplemental Comments are untimely; (2) that the Notice of Proposed Rule Making ("NPRM") in the proceeding is not a "Final Order"; and (3) that this proceeding in fact involves an "incompatible channel swap" and hence other expressions of interest may not be accepted. As will be demonstrated below, Willis' timeliness and "incompatible channel swap" contentions are irrelevant in the context of this proceeding and its "Final Order" arguments are contrary to law and Willis' own contentions in this proceeding. In support of this Reply, the following is respectfully submitted.

¹ Willis is the successor in interest to Proponents St. Pé Broadcasting, Inc.

DISCUSSION

1. Although the NPRM clearly advised the Proponents:

3... should another party indicate an interest in the C3 allotment at Utica, the modification cannot be implemented unless an equivalent Class channel is also allotted.

8 FCC Rcd at 4080 – a conclusion that no incompatible channel swap was involved in this proceeding – no mention was made by Proponents either *before* the NPRM was released or during the period provided for reconsideration under 47 U.S.C. § 405 that an “incompatible channel swap” was involved in this proceeding.

2. Pursuant to the above quoted portion of paragraph 3 of the NPRM, Mr. Brady timely filed an expression of interest for the proposed upgraded channel at Utica.² However, Proponents thereafter failed to comply with NPRM para. 3 requiring them to demonstrate the availability of an additional equivalent channel at Utica. Rather, after the reconsideration period had expired, Proponents argued that this proceeding involves an “incompatible channel swap” and hence that the mandates contained in NPRM paragraph 3 should be ignored.

3. Brady’s Supplemental Comments were filed less than 30 days after the filing of a Petition for Rule Making seeking the allocation of an additional channel at Hazlehurst. Thus the Supplemental Comments did no more than bring to the Commission’s attention new facts establishing the correctness of its determination in paragraph 3 of the

² Willis has argued that Mr. Brady’s expression of interest was untimely because the Commission’s Public Notice incorrectly stated it had been filed a day late. However, Mr. Brady’s comments were in fact received at the Commission on the cut-off date. (See e.g. Supplemental Comments, p. 2)

NPRM that no “incompatible channel swap” is involved in this proceeding. They also noted that consideration of Proponents' late efforts to have the Commission materially alter paragraph 3 of the NPRM are precluded by 47 U.S.C. § 405.

THE NPRM IS A FINAL ORDER

4. Willis contends, without citation of any authority, that the NPRM could not be a Final Order because it would deprive the Commission of the necessary flexibility to modify its Rules in a manner most consistent with the public interest. Willis is incorrect.

5. An NPRM in an FM allocations proceeding does two things. First it gives notice that it intends to amend Section 73.202(b) of the Rules. Second, the NPRM establishes the ground rules under which the proceeding is conducted. An NPRM thus has two facets, the second of which fixes rights and imposes legal obligations on all persons wishing to participate.

6. Clearly, the cut-off dates fix participation rights and Willis continues to contend that Brady's expression of interest should be disregarded because it did not meet that requirement. Similarly, paragraph 3 of the NPRM gave Proponents clear and precise notice of what was required if an expression of interest is filed and the effect – dismissal of the proceeding – if Proponents failed to comply. Proponents neither timely sought reconsideration of the NPRM nor made any effort to satisfy the mandate imposed by the NPRM.

7. Willis, it is submitted, cannot have it both ways. If, as it contends, the NPRM requires, on grounds of timeliness, that Brady's legal right to participate is foreclosed, there can be no question that the NPRM is a Final Order. Brady, in fact, complied with the mandate of the NPRM, Proponents did not.

8. Moreover, Willis does not contend that the NPRM was not valid on its face or that it was not issued in accordance with the Commission's Rules. It was therefore incumbent on Proponents to timely seek reconsideration of the NPRM if they believed the NPRM contained error. This was not done until August 9, 1993, well after the July 26, 1993 date when the NPRM became Final.³ The Commission is therefore without jurisdiction to reconsider and modify those portions of the NPRM here under consideration. *Reuters Ltd. v. FCC*, 781 F.2d 946, 59 RR2d 1063 (D.C. Cir. 1986). (Once an Order, issued in accordance with the Commission's Rules, becomes final the agency may not set it aside). *Accord. Hughes Moore & Associates*, 7 FCC Rcd 1454, 1455 (1992) (Once an Order is final any attempt to modify it is void ab initio.)

NO INCOMPATIBLE CHANNEL SWAP

9. Willis acknowledges that the plain language of the Commission Order requires, as a condition for concluding an "incompatible channel swap" is involved, that the exchange channel "must be the only channel that can be substituted." (Opposition, p.3); but Willis argues, however, that because, the Commission has refused to

³ See Supplemental Comments, pp. 3-4.

require an existing licensee to change transmitter location, there is an unstated exception to the incompatible channel swap rule. Specifically, Willis claims that not only must the exchange channel be the only channel that can be substituted, but it must also meet all mileage separation from an existing licensee's site (Opposition, pp. 3-4).

10. While this is an interesting argument, Willis cites no authority for the existence of such an exception. More fundamentally, such an argument comes far too late. To be considered, such a contention had to be made during the reconsideration period that ended on July 16, 1993, as it would have, if successful, deprived Brady of the right to file an expression of interest expressly contemplated in paragraph 3 of the NPRM.

THE SUPPLEMENTAL COMMENTS WERE TIMELY

11. As previously noted, the Supplemental Comments were filed less than 30 days after a Petition for Rule Making was filed seeking the allocation of another FM channel at Hazlehurst. The timing of this submission was consistent with the Commission's rules. Section 1.429(b) of the Rules, for example, clearly contemplates the submission of new facts which have occurred since the last opportunity to present information to the Commission. The basis for the Supplemental Comments was clearly stated in the pleading. The fact that the Supplemental Comments also brought to the Commission's attention a related jurisdictional matter in no way taints the timeliness of the Supplemental Comments.

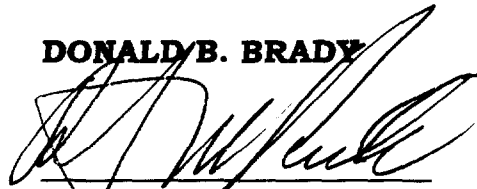
12. Equally significant, it is also apparent from the arguments made by Willis that Proponents have always known that a second FM channel could be allocated to Hazlehurst, but elected to remain silent, even in its Comments and Replies, in hopes that it might be overlooked.⁴ Now that the "cat is out of the bag," Willis should not be heard to complain.

CONCLUSION

13. Proponents' arguments that the NPRM may have contained an error come far too late. The NPRM is a "Final Order", valid on its face and issued in accordance with the Commission's Rules. Proponents elected both not to timely seek reconsideration of the NPRM and not to comply with the express terms of NPRM paragraph 3. Since the time for compliance has long since passed, this proceeding must be terminated in accordance with the express provisions of the NPRM.

Respectfully submitted,

DONALD B. BRADY



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February 2, 1994

⁴ Considering the content of paragraph 3 of the NPRM, it seems apparent that the Commission as well as Proponents were aware of the availability of a second channel at Hazlehurst.

CERTIFICATE OF SERVICE

I, Dawn A. Smith, a secretary in the law offices of Haley, Bader & Potts, hereby certify that I have on this 2nd day of February, 1994, sent copies of the foregoing "REPLY TO OPPOSITION TO SUPPLEMENT COMMENTS OF DONALD B. BRADY" by first-class United States mail, postage prepaid, to the following:

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